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Witech Sdn Bhd & Ors v BHR Group Ltd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-03–149 OF 2003
ABDUL MALIK ISHAK, KN SEGARA AND KANG HWEE GEE JJCA
5 AUGUST 2010

Civil Procedure — Judgment — Default judgment — Setting aside — Appeal against refusal to set aside judgment in default of defence — Whether default judgment regularly obtained — Whether obtained in violation of one or more of relevant procedural rules — Whether default judgment should be set aside as of right — Rules of the High Court 1980 O 19 rr 2(1), 7(1) & (3)

The BHR Group Limited ('the plaintiff'), a company incorporated in England, had appointed Witech Sdn Bhd ('the first defendant'), a Malaysian company, as its sole agent for its business in Malaysia. In early July 1998, the plaintiff was awarded a £54,825 contract by Sarawak Shell Sdn Bhd. Thereafter in February 1999, Sarawak Shell Sdn Bhd confirmed to the plaintiff company that it had made payment in the sum of RM357,315.60 into the current account of the first defendant 'in trust for the plaintiff'. When the first defendant failed to remit to the plaintiff the sum of RM328,548, which was the sum due to the plaintiff after the deduction of the first defendant's commission, the latter commenced an action against the first defendant and the second to sixth defendants, who were the directors of the first defendant. It was the plaintiff's case that the first defendant had breached a fiduciary duty and that the second to eighth defendants through their association with the first defendant company had knowingly assisted in the said breach. The plaintiff also claimed that the first to eighth defendants had converted the sum of RM328,548, to their own use by drawing and issuing a series of cheques from the first defendant's current account to third parties and strangers, namely the ninth to 21st defendants. The plaintiff entered judgment in default of defence under O 19 r 2(1) of the Rules of the High Court 1980 ('RHC') against the first, sixth, seventh, eighth, 13th, 19th and 20th defendants ('the seven appellants') to jointly and severally pay the plaintiff the sum of RM328,548 with interest and costs to be taxed. The seven appellants applied to set aside the respective judgments in default but their application was dismissed by the deputy registrar and later by the High Court judge. This was the seven appellants appeal against the refusal to set aside the judgments in default.

Held, allowing the appeal with costs:

(1) (per **Abdul Malik Ishak** and **KN Segara JJCA**) The plaintiff's claim against the 21 defendants in the instant case was not for a liquidated

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demand only. The plaintiff sought damages for breach of trust, a declaration for all the necessary accounts and inquiries for tracing and recovering the assets as well as an injunction. Thus, the plaintiff could not invoke O 19 r 2(1) of the RHC upon default of pleadings. The judgments in default obtained in the instant case were irregular because they were obtained in violation of one or more of the relevant procedural rules, ie contrary to O 19 r 7(1) and (3) of the RHC. In the circumstances any aggrieved defendant was entitled to have the default judgment against him set aside as of right or ex debito justitiae. The court was completely precluded from considering the merits of the case when the default judgment obtained was irregular (see paras 18–20, 27 & 46).

(2) (per **Abdul Malik Ishak** and **KN Segara JJCA**) There was no decision made by the judicial commissioner as to whether there was compliance by the plaintiff with the registrar's circular dated 12 December 1986 issued to all advocates in Sabah and Sarawak. Nevertheless, the importance of the registrar's circular as a practice direction could never be doubted. Rules are made to be followed and not to be broken willy-nilly without any consequences or sanctions fitting the justice of the case (see paras 23 & 50).

[Bahasa Malaysia summary

BHR Group Limited ('plaintif'), sebuah syarikat yang ditubuhkan di England, telah melantik Witech Sdn Bhd ('defendan pertama'), sebuah syarikat Malaysia, sebagai agen tunggal untuk perniagaannya di Malaysia. Pada awal Julai 1998, plaintif telah diawardkan kontrak berjumlah £54,825 oleh Sarawak Shell Sdn Bhd. Kemudiannya pada Februari 1999, Sarawak Shell Sdn Bhd mengesahkan kepada plaintif bahawa ia telah membuat pembayaran berjumlah RM357,315.60 ke dalam akaun semasa defendan pertama 'sebagai amanah untuk plaintif'. Apabila defendan pertama gagal memberikan jumlah RM328,548, yang mana merupakan jumlah yang perlu dibayar kepada plaintif selepas komisyen defendan pertama ditolak, plaintif telah memulakan tindakan terhadap defendan pertama dan defendan kedua hingga defendan keenam, yang merupakan pengarah-pengarah bagi syarikat defendan pertama. Adalah kes plaintif bahawa defendan pertama telah melanggar tanggungjawab fidusiari dan bahawa defendan kedua hingga defendan kelapan melalui perhubungan dengan defendan syarikat pertama telah dengan sengaja membantu dalam pelanggaran tersebut. Plaintif juga mendakwa bahawa defendan pertama hingga defendan kelapan telah menukarkan jumlah RM328,548 untuk kegunaan mereka sendiri dengan mengeluarkan beberapa cek daripada akaun semasa defendan pertama kepada pihak ketiga dan orang asing, iaitu defendan kesembilan hingga defendan ke-21. Plaintif telah memasukkan penghakiman ingkar pembelaan di bawah A 19 k 2(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') terhadap defendan-defendan pertama, keenam, ketujuh, kelapan, ke-13, ke-19 dan

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ke-20 ('tujuh perayu') untuk membayar plaintif secara bersesama dan berasingan jumlah RM328,548 dengan faedah dan kos untuk ditaksirkan. Tujuh perayu tersebut telah memohon untuk mengetepikan penghakiman-penghakiman ingkar tersebut tetapi permohonan mereka ditolak oleh timbalan pendaftar dan kemudiannya oleh hakim Mahkamah Tinggi. Ini merupakan rayuan tujuh perayu terhadap penolakan untuk mengetepikan penghakiman-penghakiman ingkar tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Abdul Malik Ishak** dan **KN Segara HHMR**) Tuntutan plaintif terhadap 21 defendan-defendan dalam kes ini bukan untuk tuntutan jumlah tertentu sahaja. Plaintif telah menuntut ganti rugi bagi pecah amanah, deklarasi bagi semua akaun dan siasatan yang perlu untuk menjejak dan mendapatkan semula aset-aset dan juga injuksi. Oleh itu, plaintif tidak boleh mengguna pakai A 19 k 2(1) KMT apabila keingkaran pliding berlaku. Penghakiman-penghakiman ingkar yang diperoleh dalam kes ini adalah di luar aturan kerana ianya diperoleh dengan melanggar satu atau lebih kaedah-kaedah prosedur, iaitu bertentangan dengan A 19 k 7(1) and (3) KMT. Dalam keadaan ini, defendan yang terkilan berhak untuk mendapat penghakiman ingkar terhadapnya diketepikan sebagai hak atau ex debito justitiae. Mahkamah dihalang sama sekali daripada mengambilkira merit-merit kes tersebut apabila penghakiman ingkar yang diperoleh adalah di luar aturan (lihat perenggan 18–20, 27 & 46).

(2) (oleh **Abdul Malik Ishak** dan **KN Segara HHMR**) Tiada keputusan yang dibuat oleh pesuruhjaya kehakiman mengenai sama ada plaintif telah patuh dengan pekeliling pendaftar bertarikh 12 Disember 1986 yang telah dikeluarkan kepada semua peguamcara di Sabah dan Sarawak. Namun begitu, kepentingan pekeliling pendaftar sebagai arahan amalan sememangnya tidak boleh disangsikan. Kaedah dibuat untuk diikuti dan bukan untuk dilanggar sewenang-wenangnya tanpa sebarang akibat atau sanksi berpadanan dengan keadilan sesuatu kes (lihat perenggan 23 & 50).]

Notes

For cases on default judgment, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4209–4249.

Cases referred to

Adzmi bin Ali & Anor v Mohamed Isa bin Kasad [1987] 2 MLJ 199, SC (refd)
Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc (The 'Saudi Eagle') [1986] 2 Lloyd's Rep 221, CA (refd)
Ang Chee Seng v Tan Khee Swee [1935] MLJ 245 (refd)
Anlaby and others v Praetorius (1888) 20 QBD 764, CA (refd)

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Armitage v Parsons [1908] 2 KB 410, CA (refd)
BP Malaysia Sdn Bhd v Low Nam Hui Co Ltd [1970] 2 MLJ 78, HC (refd)
Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd [1998] 4 All ER 753, Ch D (refd)
Chong Kueng Ying & Ors v Lovis Lavagna [1971] 2 MLJ 225, HC (refd)
Chu Kam Lun v Yap Lisa Susanto [1999] 3 HKC 378, CA (refd)
Costellow v Somerset County Council [1993] 1 WLR 256, CA (refd)
Development & Commercial Bank Bhd v Cheah Theam Swee [1989] 2 MLJ 496, HC (refd)
Evans v Bartlam [1937] AC 473, HL (refd)
Fira Development Sdn Bhd v Goidwin Sdn Bhd [1989] 1 MLJ 40, SC (refd)
Government of Malaysia v Sim Soe Hoe [1990] 1 MLJ 379, HC (refd)
Leong Han v Kupusamy [1959] MLJ 95, HC (refd)
Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd [1990] 2 MLJ 12, SC (refd)
Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors [1988] 3 MLJ 165, HC (refd)
Malaysia Building Society Bhd v Lim Kheng Kim & Ors [1988] 3 MLJ 175, HC (refd)
Mercurine Pte Ltd v Canberra Development Pte Ltd [2008] SGCA 38 [2008] 4 SLR 907, CA (refd)
OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors [2001] 5 MLJ 129, HC (refd)
Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd [1996] 4 HKC 157, CA (refd)
Premier Fashion Wears Ltd v Li Hing Chung [1994] 1 HKC 213, CA (refd)
Syarikat Joo Seng & Anor v Habib Bank Ltd [1986] 2 MLJ 129, SC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30; [1996] 1 AMR 215, FC (refd)
White v Weston [1968] 2 QB 647, CA (refd)
Willowgreen Ltd v Smithers [1994] 1 WLR 832, CA (refd)

Legislation referred to

Legal Profession Act 1976
Rules of the High Court 1980 O 1 r 7, O 12 r 2, O 19 rr 2, 2(1), 3, 4, 5, 7(1), (3), 9
Sarawak Advocates (Practice and Etiquette) Rules 1988 r 56

Appeal from: Suit No 22–44 of 2001 (MR) (High Court, Miri)

Tai Choi Yu (Tai Choi Yu & Co) for the appellants/defendants.
Bong Ah Loi (Suhaili Bong & Co) for the respondent/plaintiff.

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Abdul Malik Ishak JCA:

[1] I have read the judgment of my learned brother Nihrumala Segara MK Pillay JCA and I totally agree with His Lordship that the appellants' appeal should be allowed with costs fixed at RM500 and that the deposit to be refunded to the appellants. In support of His Lordship's judgment, I have this to say.

[2] The chronology of events that led to the four default judgments must be viewed in its correct perspective. They should be considered as important facts that cannot be swept under the carpet. I will now itemise them:

(a) The first, seventh and eighth defendants and that would be the first, third and fourth appellants filed their memorandum of appearance on *23 June 2001*.

(b) The sixth and 20th defendants and that would be the second and seventh appellants filed their memorandum of appearance on *5 July 2001*.

(c) The 19th defendant and that would be the sixth appellant filed its memorandum of appearance on *30 July 2001*.

(d) The second, fourth, tenth, 13th, 15th and 18th defendants filed their memorandum of appearance on *9 October 2001*. The 13th defendant would be the fifth appellant.

(e) On *23 July 2001*, the plaintiff/respondent filed the ex parte judgment in default of defence against the first, sixth, seventh and eighth defendants and that would be the first, second and fourth appellants without notice to the appellants or to the appellants' solicitors on record.

(f) Again, on *8 August 2001*, the plaintiff/respondent filed the ex parte judgment in default of defence against the 20th defendant and that would be the seventh appellant without notice to the appellants or to the appellants' solicitors on record.

(g) Yet again, on *22 August 2001*, the plaintiff/respondent filed the ex parte judgment in default of defence against the 19th and 21st defendants without notice to the appellants or to the appellants' solicitors on record. The 19th defendant would be the sixth appellant.

(h) Again, on *13 November 2001*, the plaintiff/respondent filed the ex parte judgment in default of defence against the second, fourth, tenth, 15th and 18th defendants without notice to the defendants or to the defendants' solicitors on record.

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(i) Finally, on *27 December 2001*, the plaintiff/respondent served the ex parte judgment in default of defence on the first, sixth, seventh, eighth, 13th, 19th and 20th defendants (referring to the first to the seventh appellants) as well as the 21st defendant through the appellants' solicitors on record.

[3] Now, O 12 r 2 of the Rules of the High Court 1980 ('RHC') defines the memorandum of appearance as a request to the registry to enter an appearance for the defendant or defendants specified in the memorandum. And the memorandum of appearance must be in the prescribed form with such variations as the circumstances of the case require as stipulated in O 1 r 7 of the RHC. Here, the memorandum of appearance was correctly filed in the prescribed form.

[4] It was argued that there was non-compliance by the plaintiff/respondent with r 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988. That rule reads as follows:

> Where the name of the advocate or his firm appears on the court record or the fact of representation is known to the other side, no advocate representing the other party to the proceedings shall enter judgment by default against the client of the first-named advocate or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any order in the proceedings by such first-named advocate, unless he shall have given to such first-named advocate written notice of his intention to do so, and forty-eight hours shall have elapsed after the delivery of such notice to the first-named advocate.

[5] The learned judicial commissioner ('JC') considered this issue and held that the plaintiff/respondent had given the requisite 48 hours statutory notice under r 56 of the Sarawak Advocates (Practice and Etiquette) Rules 1988 to the appellants/defendants. Indeed learned counsel for the plaintiff/respondent by way of a letter dated 22 June 2001 gave the relevant notice to the appellants' counsel. The crucial words in that letter were, 'Please treat this letter as the necessary notice'.

[6] Only the fifth, 11th and 17th defendants have filed their statement of defence. The rest of the defendants have not done so.

[7] Now, the jurisdiction to set aside an ex parte judgment in default of defence is housed in O 19 r 9 of the RHC. It reads as follows:

> The court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

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[8] It cannot be doubted that the court has the discretion to set aside or vary a judgment entered in default as a result of procedural non-compliance with the rules unless the judgment has been obtained on its merits or by way of consent. This is a paraphrase of what Lord Atkin said in *Evans v Bartlam* [1937] AC 473. At pp 479–480 of the report, this was what Lord Atkin said verbatim:

> I agree that both rules, Order XIII r 10, and Order XXVII r 15, give a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

[9] It is appropriate to mention that *Evans v Bartlam* has been followed dutifully by the Malaysian courts in the following cases:

(a) *Adzmi bin Ali & Anor v Mohamed Isa bin Kasad* [1987] 2 MLJ 199;

(b) *BP Malaysia Sdn Bhd v Low Nam Hui Co Ltd* [1970] 2 MLJ 78;

(c) *Development & Commercial Bank Bhd v Cheah Theam Swee* [1989] 2 MLJ 496;

(d) *Fira Development Sdn Bhd v Goidwin Sdn Bhd* [1989] 1 MLJ 40;

(e) *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165;

(f) *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175;

(g) *Government of Malaysia v Sim Soe Hoe* [1990] 1 MLJ 379;

(h) *Malayan Banking Bhd & Anor v Swasta Jaya Sdn Bhd* [1990] 2 MLJ 12;

(i) *Leong Han v Kupusamy* [1959] MLJ 95; and

(j) *Chong Kueng Ying & Ors v Lovis Lavagna* [1971] 2 MLJ 225.

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[10] VK Rajah JA writing for the Singapore's Court of Appeal in the case of *Mercurine Pte Ltd v Canberra Development Pte Ltd [2008] SGCA 38* [2008] 4 SLR 907 laid down the appropriate legal tests to be applied in assessing whether to set aside a judgment in default. The summary of His Lordship's views have been reproduced in *The Law Review* (2008), p 652, particularly at p 653, and I will now reproduce them verbatim:

> Where the default judgment sought to be set aside was a regular one, the *Evans v Bartlam* test (ie, whether the defendant could show a prima facie defence that raised triable or arguable issues) was preferable. Where the default judgment sought to be set aside was an irregular one, setting aside as of right (viz, the ex debito justitiae rule) remained the starting point, especially in cases where the irregularity consisted of the premature entry of a default judgment or a failure to give proper notice of the proceedings to the defendant — ie, in cases where there had been egregious procedural injustice to the defendant. This starting point might, however, be departed from where there were proper grounds for doing so. The court had an unfettered discretion to decide whether the ex debito justitiae rule should be followed, and, in exercising this discretion, it might take into account, among other factors (a) the blameworthiness of the respective parties (eg, whether there had been undue delay on the defendant's part in making its setting-aside application); (b) whether the defendant had admitted liability under the default judgment; and (c) whether the defendant would be unduly prejudiced if the irregular default judgment was allowed to stand. In those instances where the court was of the view that there had been no procedural injustice of such an egregious nature as to warrant setting aside the irregular default judgment as of right, the court had to go on to consider whether to nonetheless set aside the irregular default judgment on some other basis apart from the *ex debito justitiae* rule. To this end, it was crucial for the court to take into account the merits of the defence. Should the court find that the defendant was 'bound to lose' if the default judgment was set aside and the matter relitigated, the court should ordinarily uphold the default judgment, subject to any variation which the court deemed fit to make and/or any terms which it deemed fit to impose.
>
> In both types of setting-aside applications — ie, relating to regular and irregular default judgments respectively — the defendant's delay in making the application was a relevant consideration and might be determinative where there had been undue delay. As a rule of thumb, the longer the delay, the more cogent the merits of the setting-aside application had to be. Given the court's wide discretion as to whether to set aside, uphold or vary a default judgment, the list of factors which the court might take into account when ruling on a setting-aside application was open-ended.

[11] The English Court of Appeal in *Anlaby and others v Praetorius* (1888) 20 QBD 764, held that a defendant was entitled to set aside an irregular default judgment ex debito justitiae, that is, as of right. This was followed dutifully in *Ang Chee Seng v Tan Khee Swee* [1935] MLJ 245 and in *OCBC Bank (M) Bhd & Anor v Livision Sdn Bhd & Ors* [2001] 5 MLJ 129.

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[12] However, an irregular judgment may be corrected if the irregularity is due to an error arising from an accidental slip or omission (*Armitage v Parsons* [1908] 2 KB 410 (CA)).

[13] Where the amount in the default judgment was wrong, and the parties were agreed as to the aggregate amount owed, the court in *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Habib Bank Ltd* [1998] 4 All ER 753 ordered that the judgment be varied accordingly.

[14] Fry LJ in *Anlaby and others v Praetorius* at p 768 aptly said that:

> The court acts upon an obligation; the order to set aside the judgment is made ex debito justitiae, and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution, and possibly to an action of trespass.

[15] In *White v Weston* [1968] 2 QB 647 (CA); and in *Willowgreen Ltd v Smithers* [1994] 1 WLR 832, the English Court of Appeal held that the default judgment entered against the defendant was irregular and it ought to be set aside ex debito justitiae because proper service of the proceedings had not been effected.

[16] There is a passage in the judgment of Sears J in the case of *Po Kwong Marble Factory Ltd v Wah Yee Decoration Co Ltd* [1996] 4 HKC 157 (CA), that merits reproduction. It is found at p 161. There Sears J had this to say:

> In my judgment, whilst it can be rightly said that a judgment which has been obtained irregularly ought to be set aside as of right, in other words that the merits of the particular defence to the claim do not have to be entered into by the court, nevertheless, there is always a residual discretion in the court to have regard to the conduct of the parties. For example, if a judgment has been obtained irregularly and the writ comes to the notice of the defendant, he may delay for a certain period of time before taking any action on the writ. In my judgment, the court still has a discretion — having regard to what the defendant himself has done — to deprive him, if necessary, of that judgment or alternatively, to impose terms upon the setting aside of the judgment which accord with justice having regard to the facts of the particular case.

[17] Here, in setting aside the four default judgments, there was no necessity to impose any new terms.

[18] I wholeheartedly agree with my learned brother Nihrumala Segara MK Pillay JCA that the judgments in default obtained by the plaintiff/respondent are irregular because these judgments were obtained contrary to O 19 r 7(1) and (3) of the RHC. It must be recalled that the plaintiff's/respondent's claim

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was not a claim for a liquidated demand only as envisaged under O 19 r 2(1) of the RHC nor was it for unliquidated damages only as envisaged in O 19 r 3 of the RHC nor was it for detention of movable property only as set out in O 19 r 4 of the RHC nor was it for possession of immovable property only as illustrated in O 19 r 5 of the RHC.

[19] The statement of claim at pp 34–42 of the appeal record sought for damages breach of trust, it also sought for a declaration, it also sought for all the necessary accounts and inquiries to enable the plaintiff/respondent to trace and recover the assets, it also sought for the delivery up or transfer of the assets to the plaintiff/respondent, it also sought for an injunction and, finally, it craved the court to allow the plaintiff/respondent to trace all the monies received against the ninth, tenth, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th and 21st defendants.

[20] The four default judgments were obtained pursuant to O 19 r 2(1) of the RHC and not pursuant to O 19 r 7(1) of the RHC. Order 19 rule 2(1) of the RHC relates to a claim by the plaintiff against the defendant for a liquidated demand only. But the statement of claim was not concerned with a claim for a liquidated demand only. It was wrong for the plaintiff/respondent to invoke O 19 r 2(1) of the RHC in securing the default judgments.

[21] Irregular default judgments cannot be allowed to subsist. It must be set aside forthwith — as a matter of right. Edgar Joseph Jr FCJ writing for the Federal Court in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 36; [1996] 1 AMR 215 at p 225, had this to say about an irregular judgment:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.
>
> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justicia, that is to say, irrespective of the merits and without terms.

[22] To confound the matter further, the plaintiff/respondent also failed and/or refused to give the requisite four days notice within the ambit of the Registrar's Circular No (U) 3 of 1986, O 19 r 2 (Practice Note) dated 12 December 1986 as exhibited at p 13 of the supplementary record of appeal. This registrar's circular reads as follows:

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> Where under this rule if the defendant fails to serve the defence on the plaintiff the practice form now shall be that the advocate for the plaintiff shall not enter judgment by default unless he shall have given to the advocate for the defendant written notice of his intention to do so, and 4 days shall have elapsed after the delivery of such notice to the advocate for the defendant.

[23] It is rather unfortunate that the learned JC did not make any finding as to whether there was compliance by the plaintiff/respondent with the registrar's circular dated 12 December 1986 issued to all the advocates in Sabah and Sarawak. The importance of the registrar's circular as a practice direction can never be doubted. Indeed its importance was highlighted by Sir Thomas Bingham MR in *Costellow v Somerset County Council* [1993] 1 WLR 256 (CA). Writing for the Court of Appeal, His Lordship had this to say at p 263 of the report:

> The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed.

[24] The defendants must be protected from the injustice that they might incur if a judgment is entered against them in contravention of the relevant procedural rules or in some other way that might prevent them from exercising their right to defend the action.

[25] There are two types of default judgments. One is known as a regular default judgment. The other is known as an irregular default judgment.

[26] If the defendant have been given a proper notice of the proceedings and the plaintiff has complied with the other relevant procedural rules, then the default judgment that is obtained is known as a regular judgment. And if the defendant proposes to set aside such a judgment, he has to satisfy the court that there is a defence with a real prospect of success (*Premier Fashion Wears Ltd v Li Hing Chung* [1994] 1 HKC 213 (CA); and *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc (The 'Saudi Eagle')* [1986] 2 Lloyd's Rep 221 (CA)). However, the court might also consider the reasons as to why the defendant defaulted, but the defendant is not under a duty to show a good reason for the default in order to have the regular judgment set aside (*Evans v Bartlam*).

[27] The scenario is entirely different if the court holds that the default judgment obtained is irregular, like the present appeal at hand. A classic example of an irregular default judgment is when it is obtained in violation of one or more of the relevant procedural rules. Thus, a default judgment which is irregular will be set aside as of right (ex debito justitiae). What it amounts to is this. That the court has no discretion in the matter concerning a default

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judgment which is obtained irregularly. The court must do only one thing. It must set aside the irregular judgment. And the court is precluded completely from considering the merits of the defence (*Anlaby and others v Praetorious*; *White v Weston*; *Willowgreen Ltd v Smithers* and *Chu Kam Lun v Yap Lisa Susanto* [1999] 3 HKC 378 (CA)).

[28] I reiterate that this appeal concerns default judgments obtained irregularly and this court is thus precluded from considering the defence of the appellants/defendants. As an irregular judgment, it must be set aside as of right.

[29] For the reasons adumbrated above, I now make those orders as made by my learned brother Nihrumala Segara MK Pillay JCA.

KN Segara JCA (delivering judgment of the court):

[30] The plaintiff, a company incorporated in England and having a registered address in UK, filed a writ and statement of claim in the High Court of Sabah and Sarawak at Miri, on 21 May 2001, against 21 defendants. One of the divisions in the plaintiff company deals with the supplies of tools and equipment to the oil and gas industries.

[31] The first defendant is a company incorporated in Malaysia with a registered address in Kuala Lumpur and a business address in Miri.

[32] Briefly, the following can be ascertained from the statement of claim.

[33] The second, third, fourth, fifth and sixth defendants were at all material times the directors of the first defendant company. The seventh defendant was at all material times the business development coordinator of the first defendant company. The eighth defendant was at all material times an authorised signatory of the first defendant company's current account No 36091–3500042–3–000 maintained with Sime Bank Bhd, Miri.

[34] The ninth to 21st defendants are third parties and strangers. The plaintiff company appointed the first defendant company as their sole agent for the plaintiff's business in Malaysia. The first defendant company would be paid a commission by the plaintiff company (presumably on sales in Malaysia).

[35] On 29 May 1998, the first defendant company received an enquiry from Sarawak Shell Bhd for the design, manufacture and supply of one unit of liquid gas eductor for BTMP-B application ('the liquid gas eductor'). Thereupon, the plaintiff company sent a quotation to the first defendant company for the design, manufacture, supply and pressure testing the liquid

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gas eductor in the total price of £54,825 cif Labuan Warehouse Malaysia for the first defendant's submission to Sarawak Shell Malaysia Bhd.

[36] In early July 1998, the plaintiff company was awarded the contract for the design, manufacture, supply and performance guarantee of one unit of the liquid gas eductor at £54,825 by Sarawak Shell Bhd. On 15 December 1998, the plaintiff company forwarded by air freight the liquid gas eductor to Kuala Lumpur and then by ship to Labuan. On 14 January 1999, Sarawak Shell Bhd confirmed to the first defendant company the receipt of the liquid gas eductor. In February 1999, Sarawak Shell Bhd confirmed to the plaintiff company that it had made payment in the sum of RM357,315.60 into the current account of the first defendant on 27 February 'in trust for the plaintiff' for the supply of the liquid gas eductor.

[37] The plaintiff company has asserted that the first defendant company has a fiduciary duty to remit the sum of RM328,548, after deducting commission, as payment for the liquid gas eductor delivered to Sarawak Shell Bhd.

(It is observed that Sarawak Shell Bhd has not been made a party to this action by the plaintiff company).

[38] The plaintiff company has also pleaded that the second, third, fourth, fifth, sixth, seventh and eighth defendants knowingly participated, in the aforesaid breach of fiduciary duty of the first defendant, by not causing or procuring the first defendant company to remit the said sum of RM328,548 to the plaintiff company.

[39] The plaintiff company further pleaded that the first defendant company and/or the second, third, fourth, fifth, sixth, seventh and eighth defendants knowingly assisted the first defendant company with the said breach of trust by depriving the plaintiff company the said sum of RM328,548, and converted the same to their own use by drawing and issuing a series of cheques under the said account to third parties and strangers namely the ninth, tenth, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th and 21st defendants.

[40] The plaintiff company claims:

(A) as against the 1st, 2nd, 3rd, 4th, 5th, 6th,7th and 8th Defendants jointly and severally,

(i) Judgment in the sum of £52,323.60 (equivalent to RM329,010.80);

(ii) Interest thereon at 8% p.a. on £52,250.00 (equivalent to RM328,548.00) from 1/3/1999 until date of judgment; and thereafter at 8% p.a. from date of judgment until full payment;

(iii) *Damages* for breach of trust;

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(iv) A *declaration* that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Defendants and each of them hold on constructive trust for the Plaintiff of the said sum of RM328,548.00 and/or are liable to account for all assets now or previously in their possession acquired directly or indirectly with the said sum of RM328,548.00;

(v) All necessary *accounts and inquiries* to enable the Plaintiff to trace and *recover the assets* referred to in (iv) above;

(vi) Orders for the *delivery up or transfer* to the Plaintiff of the *assets* referred to in (iv);

(vii) An *injunction* restraining the defendants and each of them by themselves their servants or agents or otherwise from disposing off the assets referred to in (iv) above, or acquired thereby, otherwise than by delivery up or transfer to the plaintiff;

(B) As against the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th and 21st Defendants, *an order* that the Plaintiff be allowed *to trace all such money* received by them through the cheques mentioned in above Paragraph 14 with interest thereon at 8% p.a. from the date of judgment until full payment to the Plaintiff;

(C) Interest;

(D) Costs;

(E) Such further or other reliefs that this Honourable Court shall deem fit.

(Emphasis added.)

[41] The plaintiff company entered judgment in default of defence under O 19 r 2 of the Rules of the High Court 1980 ('RHC') against:

(a) The *first, sixth, seventh and eighth* defendants, on 23 July 2001, to *jointly and severally* pay the plaintiff:

(i) the sum of £52,323.60 (equivalent to RM329,010.80);

(ii) interest thereon at 8%pa on £52,250 (equivalent to RM328,548) from 1 March 1999, until the date of judgment and at 8%pa on £73.60 (equivalent to RM462.80) from 30 April 1999 until the date of judgment and thereafter at 8%pa from date of judgment until full payment; and

(iii) costs to be taxed unless agreed.

(b) The *20th* defendant, on 8 August 2001, to *jointly and severally* pay the plaintiff:

(i) the sum of RM8,175;

(ii) interest thereon at 8%pa on RM6,649 from 4 March 1999 until the date of judgment and at 8%pa on RM1,526 from 8 April 1999 until the date of judgment and thereafter on the sum of RM8,175 from the date of judgment until full payment; and

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(iii) costs to be taxed unless otherwise agreed.

(c) The *19th* defendant, on 22 August 2001, to *jointly and severally* pay the plaintiff:

(i) the sum of RM3,852;

(ii) interest thereon at 8%pa on RM963 from 9 March 1999 until the date of judgment and at 8%pa on RM1,926 from 26 April 1999 until the date of judgment and thereafter at 8%pa on the sum of RM3,852 from the date of judgment until full payment; and

(iii) costs to be taxed unless otherwise agreed.

(d) The *13th* defendant, on 22 August 2001, to *jointly and severally* pay the plaintiff:

(i) the sum of RM6,000; and

(ii) interest thereon at 8%pa on RM6,000 from 23 March 1999 until the date of judgment and thereafter at 8%pa until full payment.

(In the same default judgment dated 22 August 2001 was incorporated the default judgment against the 21st defendant, worded as follows):

2. The 21st defendant jointly and severally do pay the plaintiff:

(i) the sum of RM4,800.00;

(ii) interest at 8% p.a. on the sum of RM3,600.00 from 4/3/199 until the date of judgment and at 8% p.a. on RM1,200.00 from 16/4/1999, until the date of judgment and thereafter at 8% p.a. on the sum of RM4,800.00 from the date of judgment until full payment;

3. Costs to be taxed unless otherwise agreed.

[42] The four default judgments, referred to above, were sealed and signed by the Deputy/Senior Registrar of High Court Miri. They were obtained pursuant to O 19 r 2(1) of the RHC and not pursuant to O 19 r 7(1) of the RHC.

[43] The plaintiff's claim against the *21 defendants* is not a claim for a *liquidated demand only*. The plaintiff, therefore, cannot invoke O 19 r 2(1) of the RHC, upon default of pleadings. Order 19 r 2(1) of the RHC reads:

> Where the plaintiff's claim against a defendant is for a liquidated demand *only*, then, if that defendant fails to serve a defence on the plaintiff the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

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(Emphasis added.)

[44] The plaintiff company's claim is neither one falling under O 19 r 3 of the RHC (unliquidated damages *only*) nor under O 19 r 4 of the RHC (detention of movable property *only*) or O 19 r 5 of the RHC (possession of immovable property *only*).

[45] Order 19 rule 7(1) and (3) of the RHC reads as follows:

> 7(1) Where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.
>
> (3) Any application under paragraph (1) must be by summons or motion.

[46] In our view the said judgments in default herein are irregular as the said judgments were obtained in direct contravention of O 19 r 7(1) and (3) of the RHC. Any aggrieved defendant is entitled to have the default judgment against him set aside ex debito justitiae (see *Syarikat Joo Seng & Anor v Habib Bank Ltd* [1986] 2 MLJ 129 (SC)). The entry of judgment is a serious matter leading to execution, bankruptcy or winding up proceedings. When *rules* (be it the rules of court, rules under the Legal Profession Act or registrar's directions) *regulate* how a default judgment may be *obtained* or given, they should be *obeyed*, on pain of being set aside ex debito justitae upon any disobedience.

[47] The first, sixth, seventh, eighth, 13th, 19th and 20th defendants applied to set aside the respective judgments in default, but their application was dismissed both by the deputy registrar and the High Court judge. The appeal against the refusal to set aside the judgments in default is now before us.

[48] Counsel for the appellants (the defendants) informed the court at the very out set that the sixth, 13th and 20th defendants are withdrawing from the appeal. He confirmed that only the first, third, fourth and sixth defendants wished to proceed with their appeal.

[49] We had no hesitation in allowing the appeal with costs fixed at RM500 and the deposit refunded to the appellants as the plaintiff had patently failed to comply with O 19 r 7(1) of the RHC in obtaining the judgments in default.

[50] We do not wish to interfere with the High Court judge's finding that there was in fact compliance of r 56 of the Sarawak Advocates (Practice and

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Etiquette) Rules 1988 by the solicitors for the plaintiff, despite the defence counsel's protestation that there was non-compliance. We observe that there was no finding as to whether there had been compliance with the registrar's circular dated 12 December 1986 issued to all advocates Sabah and Sarawak. Nevertheless, we wish to reiterate that rules are made to be followed and not to be broken willy-nilly, without any consequences or sanction fitting the justice of the case. The material parts of the circular are reproduced below:

> Per: Registrar circular no. (u) 3 of 1986
>
> O.19 r 2 (Practice Note)
>
> ---
>
> Where under this rule if the defendant fails to serve the defence on the plaintiff the practice from now shall be that the advocate for the plaintiff shall not enter judgment by default unless he shall have given to the advocate for the defendant written notice of his intention to do so, and 4 days shall have elapsed after the delivery of such notice to the advocate for the defendant.

[51] Appeal allowed with costs fixed at RM500. Deposit refunded to appellants. Order accordingly.

Appeal allowed with costs.

Reported by Kohila Nesan